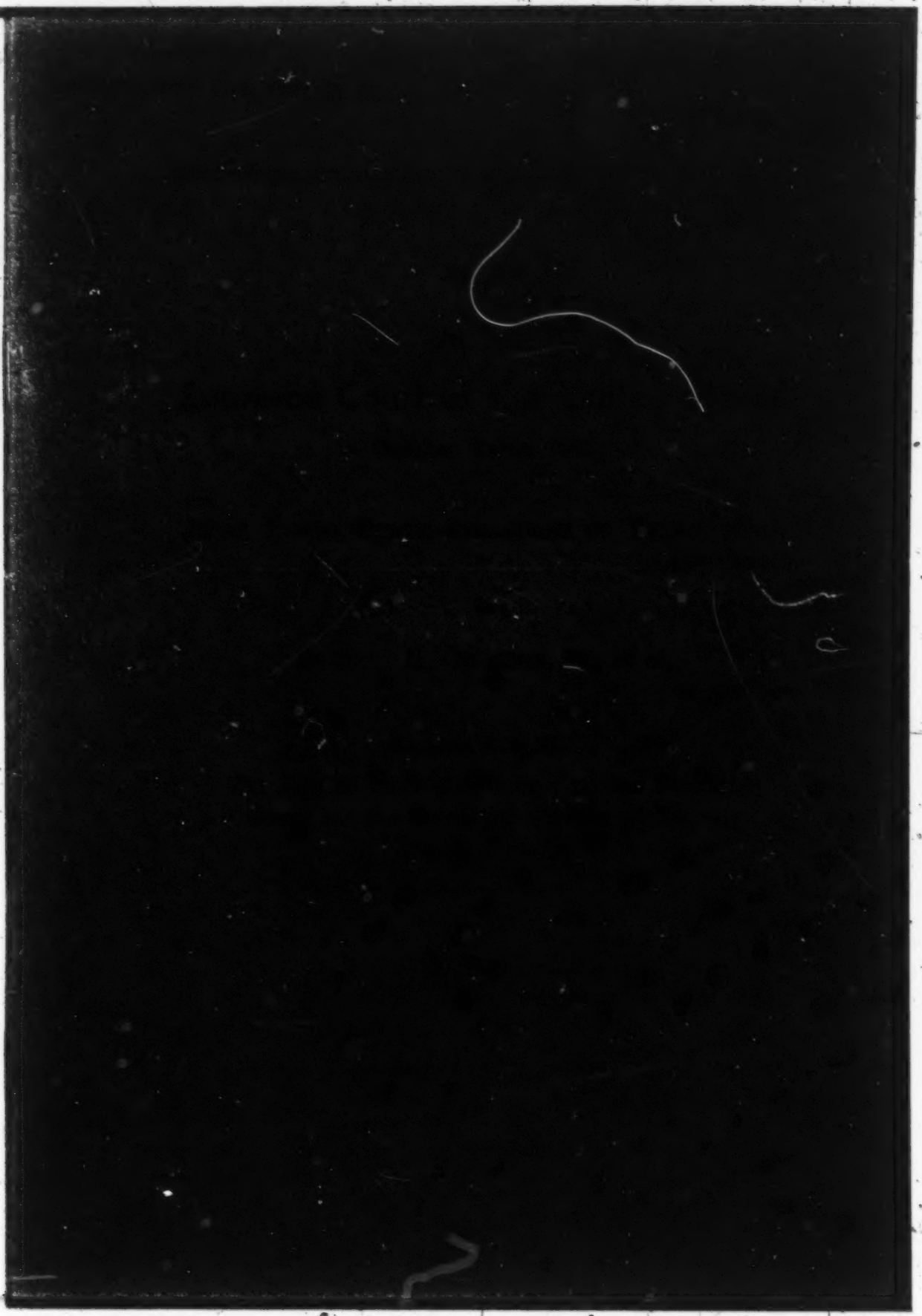

INDEX

	Page
Statement	1
Argument	3
Conclusion	6
Certificate of Service	7

AUTHORITIES

Denver Ry. Co. v. Brotherhood of Ry. Trainmen, 18 L.Ed 2d 954	5
Elfbrandt v. Russell, 384 U.S. 11	4
Keyishian v. University of New York, 385 U.S. 589	4
Moore v. New York Cotton Exchange, 270 U.S. 593	5
U.S. v. Mississippi, 380 U.S. 128	5
Whitehill v. Elkins, 19 L.Ed 2d 228	4

United States Statutes

28 U.S.C.A. §1392(a)	5
28 U.S.C.A. §1391(e)	5

Texas Statutes

Tex Rev.Civ.Stat. Art. 2603 h, J	5
Tex. Rev. Civ. Stat. Art. 2620 a	5
Tex. Rev. Civ. Stat. Art. 6252-7	1, 2, 3

Federal Rules

Rule 20 F.R.C.P.	4

No. 850

IN THE

Supreme Court of the United States

October Term, 1967

JESSE JAMES, STATE TREASURER OF TEXAS, *et al*,
Appellants,

v.

EVERETT M. GILMORE, JR., *et al*,
Appellees.

On Appeal from the United States District Court for the Northern District of Texas, Dallas, Division

---

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

Statement

Certain Defendants, including the Regents of the University of Texas, have appealed from final judgment enjoining enforcement of Article 6252-7 of the Revised Civil Statutes of Texas.[1] The three-

[1] The pertinent portion of the statute appears in the Jurisdictional Statement (pp. 3-5).

judge District Court declared the statute unconstitutional insofar as it prescribed as a condition of public employment an oath disclaiming membership in "subversive" organizations. The Defendant Dallas County Junior College did not appeal, and the jurisdictional statement appears superfluous insofar as it treats the merits of the Gilmore claim against the Junior College.

The District Court found that Plaintiffs Mantle and Kahn were denied constitutional guarantees by virtue of Appellants' application of the Texas oath. Thomas Mantle, a student at the University of Texas, was employed in the Law School Library. As a condition of his employment he was required to execute the disclaimer oath prescribed by Article 6252-7. Mantle told the University that he was a member of one of the designated "subversive" organizations, The Industrial Workers of the World, and thus, could not truthfully execute the oath. As a consequence, he was discharged from his employment with the University.

Michael Kahn was offered employment as a professor in the Psychology Department at the University of Texas. At the time of the trial, he had accepted the offer of employment, and the sole impediment to assuming his duties was the University's insistence that he execute the disclaimer oath as a condition of employment. He testified that if necessary he would forego his employment at the University rather than execute the oath.

The District Court enjoined the Appellants and the Dallas County Junior College from further enforcement of the disclaimer oath prescribed by Article 6252-7 as a condition of employment, concluding that the Texas Statute "suffers from the same 'impermissible overbreadth' which afflicted the statutory provisions struck down in *Elfbrandt* and *Keyishian*."

Argument

The District Court properly declared Article 6252-7 unconstitutional. The Texas statute conditioned teaching and other public employment upon the execution of an oath disclaiming membership in the Communist Party and other designated subversive organizations. The Texas statute includes in the definition of Communist Party "any organization which . . . seeks to overthrow the Government of the United States, or of any State, by force, violence or any other unlawful means. . . ."[2] In addition, the statute requires a disclaimer of membership in any organization designated by the Attorney General of the United States as "totalitarian, fascist, communist or subversive."

[redacted]:

Appellants' Jurisdictional Statement asserts (P. 15):

"Article 6252-7 makes no arbitrary classification of the innocent with the guilty. Innocent

[2] Tex. Rev. Civ. Stat. Ann. Art. 6252-7, §1 (1962).

> membership may be explained in all but the Communist Party. It is absurd to say that one may be an innocent member of the Communist Party."

This argument assumes what the statute will not permit. There is no ascertainable standard in the statutory definition of "Communist Party." The argument also ignores that Plaintiff Mantle was afforded no opportunity to explain his membership in the Industrial Workers of the World. The Attorney General argues that Mantle's "active" membership in I.W.W. justifies the action of the University (p. 14). Without dwelling upon the anachronisms implicit in this argument, it should suffice to recall that the University of Texas treated mere membership as requiring his discharge under Article 6252-7.

Clearly the Texas statute suffered from the same constitutional infirmity as those considered in *Keyishian v. University of New York,* 385 U.S. 589 (1967), *Elfbrandt v. Russell,* 384 U.S. 11 (1966) and most recently in *Whitehill v. Elkins,* ..... U.S....., 19 L.Ed 2d 228 (1967). The District Court properly enjoined further enforcement of the Texas oath as a condition of employment.

Apparently Appellants' principal complaint concerns venue. Venue is conceded to have been proper with respect to the action of Gilmore against the Dallas County Junior College. Joinder of all claims in a single action comported with the judicial discretion contemplated in Rule 20 of the Fed-

eral Rules. Each Plaintiff, in varying degree, suffered from the oath requirement of the Texas statute. Their claims presented common questions of law arising out of the same "series of transactions" within the meaning of Rule 20. Cf. *Moore v. New York Cotton Exchange,* 270 U.S. 593, 610 (1926). Since joinder was proper, venue as to the Appellants was also proper within the meaning of Section 1392(a) of the venue provisions 28 USCA §1392a. *U. S. v. Mississippi,* 380 U.S. 128 (1965).

Venue in the Northern District of Texas as to the University of Texas can be justified even in the absence of joinder of the Gilmore claim. Individual members of the Board of Regents reside within the Northern District. The Board of Regents of the University of Texas does business within the Northern District by its management and control of the University of Texas at Arlington and Southwestern Medical School at Dallas.[3] Just as federal officials may no longer insist that their residence for venue purposes is the District of Columbia, 28 U.S.C.A., §1391(e), State officials may not restrict venue as to them to the State capitol, when, in fact, they reside and do business in other districts. Cf. *Denver Ry. Co. v. Brotherhood of Railway Trainmen,* ..... U.S. ..... 18 L.Ed 2d 954 (1967).

Finally, Appellants assert no prejudice by virtue of the allegedly improper venue. Appellants antici-

[3] Tex. Rev. Civ. Stat. Ann. Art. 2620a (Supp. 1967); Tex. Rev. Civ. Stat. Ann. Art. 2603, h, j (1965).

pated this quandary in their "Motion for Leave to File Petition for Writ of Mandamus and/or Writ of Prohibition," *No. 368 Misc., October Term,* 1967, wherein they asserted:

> "These petitioners have no adequate remedy by appeal after the trial on the merits . . . because, after a full hearing on the merits, petitioners would not be entitled to have this cause reversed unless they could show that they were prejudiced or that a different result would have been reached had the claim against them been transferred to the judicial district of their residence. . . ." (p. 7, 8).

Appellants claim no prejudice, and even if venue were not proper in the Northern District, there is no ground for reversal of the action of the trial court.

We respectfully submit that the Appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

By .....

David R. Richards

Counsel for Appellees

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Affirm was this 21st day of December, 1967, served on Crawford C. Martin, Attorney General of Texas, by placing same in the United States Mail, postage prepaid, and addressed to

Crawford C. Martin
Attorney General of Texas
Box R
Capitol Station
Austin, Texas 78711

David R. Richards